IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2018CD00306

BETWEEN	**GENERAL ACCIDENT INSURANCE COMPANY JAMAICA LIMITED**	**CLAIMANT**
AND	**MICHAEL JOHNSON**	**DEFENDANT**

Trial in Chambers – No dispute of facts – Performance Bond – Defendant not a party to the Performance Bond – Defendant provided title to land as security for the Performance Bond – Whether deposit of title created equitable mortgage.

Maurice Manning, Arthur Compass and Gabrielle Warren instructed by Messrs. Nunes, Scholefield, DeLeon & Co. for the Claimant.

Gillian Mullings instructed by Naylor & Mullings for the Defendant.

In Chambers.

Heard: 12th March 2019 and 21st June, 2019

BATTS, J.

[1] This Fixed Date Claim came on for hearing before me in chambers, on the 12th day of March 2019. Upon enquiry the parties assured me that there were no disputed facts. The three affidavits for my consideration were: the affidavits of Sharon Donaldson dated 16th May 2018, Michael Johnson dated 19th November 2018 and Arthur D. Compass dated 15 January 2019. Both sides filed written submissions. I invited Ms. Mullings for the defendant to go first and to demonstrate, on the facts before me, why there ought not to be judgment for the claimant. Claimant's counsel thereafter made submissions.

[2] Having considered the oral and written submissions, I made the following Declarations and Order:

> 1) It is declared that the Claimant holds an equitable mortgage, in all that parcel of land part of Norbrook in the parish of St. Andrew being the portion showing section 'A' on the plan of part of Norbrook aforesaid deposited in the Office of Titles on the 30th October 1970 of the shape and dimensions and butting as appears by the Plan thereof thereunto annexed and being the land comprised in Certificate of Title registered at Volume 1416 Folio 63 of the Register Book of Titles, to secure the amount of $42,700,000.00.
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> 2) It is declared that the Claimant is entitled to be registered as the legal mortgagee in respect of the said property.
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> 3) It is ordered that the property is to be sold the details of the said order will be determined after further submission by the parties to me of a minute of proposed order on or before the 20th April 2019.
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> 4) Costs to the Claimant to be taxed if not agreed.
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> 5) Interest on the amount of $42,700,000 to run from the 13th February 2018 at the rate of judgment debt.
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> 6) Leave to appeal granted if necessary.

[3] On or about the 13th day of June 2019 it was brought to my attention that Messrs. Nunes, Scholefield DeLeon & Co. had, since the 20th March 2019, filed a proposed Minute of Order on behalf of the claimant. The defendant's counsel had not, as at the 13th June 2019, filed a proposed Minute of Order. In the circumstances, and consistently with my Order dated the 12th March 2019, on the 21st June 2019 I made the following further Orders being the details of the Order for Sale:

> "Pursuant to the Order for Sale made on the 12th day of March 2019 it is hereby further Ordered:

1) A valuation report shall be prepared for all that parcel of land, hereinafter referred to as the said property, which is more fully described in paragraph 1 of the Order made on the 12th day of March 2019.

2) The valuation is to be done by a professional real estate valuator to be agreed by the parties on or before the 21st July 2019 or, in the absence of agreement, to be selected by the Registrar of the Supreme Court from a list or lists of names submitted to the Registrar on or before the 28th July 2019 by either or both parties.

3) The sale shall proceed by public auction within 90 days of receipt of the valuation.

4) Should no sale be realised at the public auction then the sale shall proceed by private treaty.

5) The reserve price at the public auction shall not be lower than the forced sale value nor higher than the market value indicated in the valuation obtained pursuant to paragraph 1 above.

6) The Claimant's attorney shall have carriage of the sale unless the parties shall in writing otherwise agree.

7) The attorneys having carriage of sale are authorised to:

    a) retain the services of auctioneers, real estate agents or other professionals as may be necessary and if not otherwise provided for in this Order.

    b) fix the sale price in the event the sale is to be by private treaty and provided that the price so fixed is in accordance with expert advice first had and obtained.

    c) deduct and pay, prior to disbursement, all taxes, rates, dues and costs incidental to and/or arising from the sale of the said property.

d) disburse the net proceeds of sale as follows:

i. To settle all debts due and owing from the Defendant to the Claimant in respect of the equitable mortgage, interest and costs, as per the Order of the Court made on the 12th day of March 2019 and,

ii. The balance remaining if any is to be paid to the attorneys at law on record for the Defendant in this matter or, if there is no such attorney at law, be paid into Court.

8) The attorneys having carriage of sale shall file and serve a Final Statement of Account within 30 days of the sale of the said property being completed.

9) The Registrar of the Supreme Court is empowered to execute any and all documents necessary to give effect to this Order for Sale and/or to effect a transfer of the said property after such sale in the event either party fails neglects and/or refuses to sign any such document.

10) Liberty to apply to either party.

11) Claimant's attorney to prepare file and serve this Order.

[4] I did promise to put my reasons in writing and this judgment fulfils that promise. The claimant is a general insurance company and alleges that it is entitled to an equitable mortgage over property owned by the defendant. The defendant says that, as a matter of law and on a true construction of the documents, no enforceable mortgage ever came into existence. The issue for determination is therefore a rather narrow one.

[5] The material facts, as to which there is no contest, are as follows:

a) On or about the 18th or 25th January 2017 O'Brien's International Car Sales and Rental Limited (hereafter referred to as O'Brien's) entered into an agreement with the Government of Jamaica. In the agreement O'Brien agreed to procure pre-owned motor vehicles for the Jamaica Constabulary Force. The contract price was $426,930,400.00. (See exhibit SD1 and Para 2 of the Affidavit of Sharon Donaldson)

b) In support of that agreement, and on O'Brien's behalf, the claimant issued a Performance Bond in favour of the Ministry of National Security/Development Bank of Jamaica. The Performance Bond, which is at times referred to as a Performance Guarantee, is undated but is "effective" for the period January 27,2017 to May 27,2017. The bond is for the amount of $42,700,000.00 and is exhibit SD2 to the affidavit of Sharon Donaldson.

c) In order to obtain the Performance Bond O'Brien's relied on property owned by the defendant being all the property registered at Volume 1416 Folio 63 of the Register Book of Titles (Para 4 affidavit of Sharon Donaldson). The title was used as security for the Performance Bond.

d) The defendant executed a letter of consent dated 16th February 2017 (exhibit SD3 to the affidavit of Sharon Donaldson). That letter is as follows:

"*16th February 2017*

To whom it may concern

This is to confirm that I Michael Johnson agree to allow O'Brien's International Car Sales & Rental Limited permission to use my property located at Norbrook Close Kingston 8 Volume 1416 Folio 63 as security to secure Performance Bond for the period stated.

Trusting that this is adequate.

Sincerely,

Mr. Michael Johnson

e) The defendant, on or about the 18th October 2017 executed a Statutory Declaration which recited his consent to the use of his said property as security for the Performance Bond dated 21st January 2017, see Exhibit ADC2 to the affidavit of Arthur Compass.

f) The defendant either, deposited the duplicate Certificate of Title for the said land with the claimant "to be held by them as an equitable mortgage" (see Para 7 of affidavit, of Sharon Donaldson) or, delivered the title to O'Brien in order to secure a contract (see paragraphs 2 and 3 of Michael Johnson's affidavit).

g) On or about the 8th day of January 2018 the claimant lodged caveat number 20995/7 against the title for the said property (See paragraph 8, affidavit of Sharon Donaldson).

h) On or about the 1st December 2017 the Government of Jamaica made a call on the bond and alleged that O'Brien's was in breach of its obligations under the contract. (See paragraph 9, affidavit of Sharon Donaldson).

i) The claimant paid the sum of $42,700,000.00 pursuant to its obligation under the Performance Bond (See paragraph 9 of affidavit of Sharon Donaldson).

j) The claimant called upon the defendant to honour his obligations pursuant to the guarantee but he has failed, neglected and/or refused to so do. (Paragraphs 10 and 11 of Affidavit of Sharon Donaldson).

[6] In an affidavit, filed on the 19th November 2018, the defendant asserted –

"2. *In February 2017 I was approached by Mr. Clement Ebanks, a friend of mine, regarding a contract he had already entered into with the government to provide motor vehicles. Mr. Ebanks told me and I verily believe that his company O'Brien's International Car Sales & Rental Limited had already secured a contract to supply the motor vehicles and already had a Performance Bond for that contract, both were already signed and in effect. He intended to also to (sic) secure a contract for the maintenance and servicing of the motor vehicles he was in the process of supplying. I agreed to allow him to use title to property I owned in Norbrook registered at Volume 1416*

Folio 63 of the Register Book of Titles in relation to the service contract he intended to enter into. I understood the value of this service contract to be between seven and ten million Jamaican dollars.

2. *That sometime later Ebanks approached me and asked me to sign a letter in relation to the above transaction and give him the certificate of title. I signed the letter and gave him the title as he requested.*

3. *I believed that the contract was in process and that my title would be returned to me in due course.*

4. *At no time did I guarantee the sum of $42,700,000.00 or secure performance bond PB70772 as alleged or at all in relation to contract.*

5. *That I am engaged in fishing and trawling activities and I am off the island from time to time. I did not receive the letter dated March 26th 2018 exhibited to the Affidavit of Sharon Donaldson."*

[7] As a footnote to this statement of facts it should be stated that, pursuant to an Order made on the 10th January, 2019, the claimant's attorneys filed an affidavit on the 15th January 2019 which exhibited the defendant's request for Information and the answer to that request . The answer included the following documents:

a. Performance Bond for period 27 January 2017 to 27 May 2017

b. Binder #130789 extending the Performance Bond of $42,700,000.00 to 31 December 2017.

c. Statutory Declaration of Michael Johnson dated 18th October 2017.

d. copy letter dated 10th January 2019 from Nunes Scholefield Deleon & Co. to Naylor & Mullings which enclosed the abovementioned documents.

[8] The defendant's counsel asserted that the claimant was not entitled to an equitable mortgage over the said property. It was the defendant's case that:

a) The defendant was never a party to the Performance Bond

b) The Performance Bond came into existence prior to the "purported" security for the bond

c) The letter provided by the Defendant has no "nexus" to the bond

d) The letter and declaration do not constitute a deed. Therefore, as there was no consideration flowing to the defendant, they are unenforceable against him.

e) The letter is inadequate to create an equitable mortgage.

f) The performance bond would already have expired by the time the statutory declaration was issued in October 2017.

g) There is no provision in the Performance Bond providing for its extension and therefore it cannot be

extended. The security could not be used as it was not referable to the or any extended bond.

h) A Performance Bond is not a guarantee, it is a demand guarantee and different legal considerations therefore apply.

i) The bond referred to in the statutory declaration is dated 21 January 2017 and there is no document before the court which bears that date.

j) The Statutory Declaration postdates the bond mentioned in the Claim.

k) If the bond was renewed in September 2017 and the Statutory Declaration came into existence in October 2017 the claimant could not have acted to its detriment in reliance on the Declaration.

l) The alleged equitable mortgage is unenforceable because reliance is placed on past consideration.

[9] Claimant's Counsels for his part made it clear that he was no longer seeking relief pursuant to Para 6 of his Particulars of Claim. He conceded that the documentation does not support the existence of a personal guarantee from the defendant. There was, he admitted, no contract of surety between the claimant and the defendant.

[10] The claimant's counsel further submitted, as regards the alleged want of consideration, that there is no allegation of a legal mortgage and that the requirements of an equitable mortgage are different. It was submitted that the defendant consented to his property being used as collateral to support the Performance Bond. The defendant either delivered, or allowed his title to be delivered, to the claimant. There is sufficient material before the court to prove

that the transaction, to which reference is made in the defendant's statutory declaration, is the same one. The defendant knew O'Brien's had an obligation and he was prepared to allow his property to be used to guarantee that obligation. This is also made clear by the letter dated 16th February, 2017. When an equitable mortgage is created, by deposit of title deeds, equity relieves one party from the need to prove the formalities of a contract.

[11] Both counsel cited authorities but I will not reference them all. It suffices, I think, to indicate firstly that the principle in ***Halsbury's Laws of England Volume 40(2) of the Fourth edition (Reissue) at Para 1364*** applies. It is there stated,

> "*Where the claimant has been compelled by law to pay, or being compellable by law has paid, money which the defendant was ultimately liable to pay, so that the defendant obtains the benefit of the payment by the discharge of his liability, the defendant is held indebted to the claimant in the amount of the payment. The requirements for the application of the rule are as follows:*
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> 1) *The claimant must have made an actual or virtual payment of money neither the incurring liability nor the loss of goods can be treated as money paid*
>
> 2) *The claimant must have been compelled or compellable to pay this money to a third party or have been requested by the defendant to pay it*
>
> 3) *The claimant must not officiously have intervened so as to expose himself to the liability to make the payment and*
>
> 4) *The defendant must have been legally liable to pay the third party though the reason for that liability need not be the same as the one which induced the claimant to pay the third party."*

[12] The second authority to note is ***Jamaican Redevelopment Foundation Inc v. Anthony Everald Ferguson 2010HCV032288*** unreported judgment of Brooks J

(as he then was) delivered on the 22nd day of July 2011. It supports the proposition that an equitable mortgage may be created by the deposit of title deeds accompanied by a clear intent to treat the land as security for the money advanced. Brooks J stated definitively that those principles applied to land brought under the Registration of Titles Act.

[13] Thirdly, in ***Re Wallis & Simmonds (Builders) Ltd. [1974] 1 All ER 561*** Templeman J decided that the presumption, of the existence of an equitable mortgage by deposit of title deeds, applied although the debt was owed by a third party, as per Templeman J, @ page 567e of the report:

> "*But in my judgment what I am now being asked to do is not to make an extension of the doctrine; in my view the doctrine is that as a general rule a deposit of title deeds to secure a debt creates a charge on the land; it does not make any difference whether the debt is owed by the debtor or whether it is owed by somebody else; and the person who deposits the title deeds is in some way acting as a surety. There can be no distinction in logic between the two cases*."

[14] When the law is applied to the facts of this matter the result is clear. The defendant at all material times knew that Obrien required security. That security, to his knowledge, was pursuant to a contract between O'Brien and the Government of Jamaica. The security was needed to facilitate a Performance Bond issued by the claimant on O'Brien's behalf. The nature of the transaction was substantially the same as the defendant understood it to be. The letter and declaration, signed by the defendant, are evidence of the defendant's state of mind. He consented to the use of his property as security for the performance bond. It was of no moment to him that the performance bond was issued by the claimant on behalf of Obrien. Nor was it of great moment that Obrien's contract was to purchase motor vehicles and not the parts for motor vehicles. The material fact is that the amount of the bond, and the existence of the bond, are referenced in the declaration signed by the defendant. The documents evidence the defendant's state of mind .

[15] There is, in any event, a further reason why the defendant must fail. He has, by issuing the letter and delivering up his title, facilitated the conduct of Obrien. Even assuming therefore, that the defendant was misled by Obrien in some way, the defendant's recourse lies against Obrien. The defendant, by his action, would have facilitated the (alleged) deceit of the claimant by Obrien.

[16] I agree with the claimant's submission in law as to the requirements to establish an equitable mortgage. The claimant's bond was secured by the deposit of the title and its owner's consent to its deposit for that purpose.

[17] The date of the bond does not impact the substance of the matter. The documentation establishes that it is the secured bond which has been extended. The date the declaration was signed strongly supports, a conclusion that the defendant's consent applied to the extended bond. Why would he, in October 2017, execute a statutory declaration for an expired bond? The only reasonable inference is that he intended to allow his property to secure the performance bond as extended and in the amount agreed.

[18] In the result, and for the reasons stated, I granted the declarations and made the orders outlined in Paragraphs 2 and 3 above.

David Batts
Puisne Judge